MATRIMONIAL JURISDICTION.

Before Costello, M. C. Ghose and Henderson JJ.

1935

Mar. 18.

SWEENNEY

v.

SWEENNEY.*

Divorce—Adultery—Legitimacy proceedings—Bastardy—Mode of proof of non-access—Evidence, Competency to give—Applicability of English rule to British India—Indian Evidence Act (I of 1872), ss. 112, 118.

Where the husband bases his petition for divorce on the fact of his non-access to his wife, it is not open to him to ask the court to accept his own evidence on that point.

Russell v. *Russell* (1) followed.

There is a presumption of law that the child of a married woman was begotten by her husband, and neither a husband nor a wife is permitted, with the object or possible result of proving that a child born to the wife during wedlock is not the child of the husband, to give evidence showing or tending to show that they did not have sexual relations with each other at the time when the child would have been conceived.

This rule, which is the same in British India as in England, is applicable not only to cases in which the legitimacy of the child is directly in issue, but also to proceedings instituted in consequence of adultery, where the wife's adultery is sought to be established by proof that she has given birth to a child of which the husband is not the father.

The rule excludes evidence by the husband on the point of non-access, and also of any facts from which non-access might indirectly be presumed.

Premchand Hira v. *Bai Galal* (2) referred to.

Howe v. *Howe* (3) distinguished and explained.

The fact of non-access can, however, be proved by evidence *aliunde*.

Section 118 of the Indian Evidence Act does no more than enunciate the English rule with regard to the competency of parties as witnesses without in any way making admissible all the evidence, which might be given by them. In this connection the provisions of section 112 must not be overlooked.

These sections of the Indian Evidence Act were enacted many years before the decision in *Russell* v. *Russell* (1) and they embody the English common law rule of evidence applicable to legitimacy proceedings.

*Divorce Suit, No. 5 of 1934, of the Court of the District Judge of Midnapore.

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Russell v. *Russell* (1) merely made it clear that the same kind of principle is equally applicable to cases in which there is a question of proving a wife's adultery for the purpose of obtaining a dissolution of marriage.

The wording of section 112 in no way conflicts with the rule of law as laid down in *Russell* v. *Russell* (1), because it neither says in terms, nor even suggests that it would be open to a husband, petitioner, himself to give evidence tending to show that he neither had nor could have had access to his wife at the time when the child was conceived.

The words in that section, *viz.*, " unless it can be shown that the parties "to the marriage had no access to each other at any time when he could "have been begotten," mean no more than that evidence to that effect may be given but only if such evidence is not otherwise inadmissible.

REFERENCE under section 17 of the Indian Divorce Act.

The facts of the case are set forth in the judgment of Costello J.

As the parties were not represented in this confirmation proceeding, Mr. Justice Costello enquired of the Bench Clerk if there was any procedure or practice for the parties in undefended divorce proceedings to be provided with an advocate to argue important questions of law,—such as arose in the present case—similar to the practice in undefended capital sentence cases where the Crown briefed an advocate to defend the accused.

There is no similar practice in undefended divorce cases.

COSTELLO J. This is a reference under section 17 of the Indian Divorce Act for confirmation of a decree for dissolution of marriage made by the District Judge of Midnapore.

The petitioner is Joseph Anthony Sweenney and the respondent is Mercy Beatrice Catherine Sweenney. The husband—petitioner, was seeking dissolution of his marriage with the respondent on the ground of the latter's adultery with a man named Lazarus Thaddeus, who was made the co-respondent in the proceedings and against whom the learned judge made an order for payment of costs.

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The petitioner by his petition averred that he was married to the respondent on the 29th June, 1926 at the Church of the Sacred Heart at Kharagpur. The respondent at that time was a spinster. Both the petitioner and the respondent profess the Christian religion. They are Anglo-Indians and are domiciled in India. After the marriage the petitioner lived and cohabited with the respondent at Kharagpur. There was no issue of the marriage. The petitioner's case was that within a few months of the marriage he discovered that his wife had a number of lovers amongst the young men at Kharagpur. The petitioner endeavoured to check and control the behaviour of the respondent, and from time to time the respondent is said to have asked forgiveness of the petitioner and promised to behave properly. But time and again she relapsed into her dissolute ways and eventually she deserted the petitioner in the month of June, 1927 and from that time onwards she had been leading an immoral life with other young men, and ultimately took to living in open adultery with the co-respondent.

The real basis of the petitioner's case was that the respondent and the co-respondent had been living together as man and wife, and the respondent had had a son born to her, of whom the co-respondent was the father. That child is said to have been born on the 3rd January, 1932. He was baptized at the Church of the Sacred Heart at Kharagpur under the name of Edwin Hoikaz Thaddeus and apparently as the son of the respondent and the co-respondent.

The petitioner then said that, being disgusted with his life and rendered absolutely wretched by the misconduct of the respondent, he resigned from his employment on the Bengal-Nagpur Railway soon after the respondent had deserted him. He was out of employment for some time but eventually he had obtained his present employment on the Great Indian Peninsular Railway. He says that he was very much handicapped financially and so could not procure sufficient funds to institute legal proceedings for

dissolution of his marriage until he at last secured some help from his father who came by some money on retiring from service.

The learned judge in his judgment has found that the parties are domiciled in British India. He has also found that there was sufficient reason for the delay in bringing the proceedings and so the delay is no bar to the petitioner obtaining the relief, which he seeks.

On the question of adultery of the respondent with the co-respondent, however, the case comes before us in rather an unsatisfactory condition. The learned judge commenting upon the evidence given by the petitioner himself said this:—

> He has deposed that in 1930 he returned for a visit to Kharagpur and there he found that his wife was living with the co-respondent, Lazarus Thaddeus, a fireman on the Bengal-Nagpur Railway. He saw his wife coming out of the house of the co-respondent on one occasion. He had no conversation with her. In December, 1931, he again went to Kharagpur on a visit. On this occasion he saw his wife in an advanced stage of pregnancy and on a subsequent visit in 1932 he saw she was walking with a baby in a pram. The baptismal certificate has been filed showing that a woman going by the name of Mercy Thaddeus and describing herself as the wife of Lazarus Thaddeus had a baby baptised in the Church of the Sacred Heart at Kharagpur on the 13th January, 1932. The petitioner has deposed that his wife at that time was describing herself as Mrs. Thaddeus.

I say that the matter has come before us in an unsatisfactory state, because the petitioner was resting his case upon his wife's misconduct with Lazarus Thaddeus and the learned judge seems to have based his decree upon the fact that a woman calling herself Mercy Thaddeus gave birth to a child on the 3rd January, 1932. There is no evidence—at any rate no sufficient evidence—in law that that woman was in fact the wife of the petitioner. The petitioner does seem to have based his case in effect on the fact of his own non-access to his wife and, in my opinion, it was not open to him to ask the court to accept his evidence on that point.

The law with regard to this is quite clear since the decision in the case of *Russell* v. *Russell* (1). The law

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is this: There is a presumption of law that the child of a married woman was begotten by her husband, and neither a husband nor a wife is permitted, with the object or possible result of proving that a child born to the wife during wedlock is not the child of the husband, to give evidence showing or tending to show that they did not have sexual relations with each other at the time when the child could have been conceived. This Rule is applicable not only to cases, in which the legitimacy of the child is directly in issue, but also to proceedings instituted in consequence of adultery, where the fact of the wife's adultery is sought to be established by proof that she has given birth to a child of which the husband is not the father. The rule excludes evidence by the husband of non-access and also of any facts, from which non-access might indirectly be presumed. The fact of non-access can, however, be proved by evidence *aliunde*.

In my opinion, the law as regards a husband giving evidence of non-access, which would have the effect of bastardising a child—whether in legitimacy proceedings or in divorce proceedings—is the same in India as in England. This was the view taken by Sir Amberson Marten, Chief Justice of Bombay, in the year 1927, in the case of *Premchand Hira* v. *Bai Galal* (1). It is true that a contrary view was taken by the Madras High Court in the case of *Howe* v. *Howe* (2), but it is to be observed that that case was decided long before the decision of the House of Lords in *Russell* v. *Russell* (*ubi supra*) and with all respect to the learned Judges, who decided *Howe* v. *Howe* (2), I find myself unable to follow their reasoning. It seems to me that the learned Judges there gave an interpretation to section 118 of the Indian Evidence Act, 1872, which is not warranted by the language of the section itself. That section does no more than enunciate the English rule with regard to the competency of parties as witnesses without in any way

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making admissible all the evidence, which might be given by them.

In connection with the point under discussion, the provisions of section 112 must not be overlooked. That section enacts that—

> The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

The Indian Evidence Act was of course passed many years before the decision in *Russell* v. *Russell* (*ubi supra*) and it embodies the English common law rule of evidence applicable to legitimacy proceedings. *Russell* v. *Russell* (1) merely made it clear that the same kind of principle is equally applicable to cases, in which there is a question of proving a wife's adultery for the purpose of obtaining a dissolution of marriage. The wording of section 112 in no way conflicts with the rule of law as laid down in *Russell* v. *Russell* (1), because it neither says in terms, nor even suggests that it would be open to a husband, petitioner, himself to give evidence tending to show that he neither had nor could have had access to his wife at the time, when the child was conceived. The words "unless it can be shown that the parties to the "marriage had no access to each other at any time "when he could have been begotten" mean no more than that evidence to that effect may be given, but only if such evidence is not otherwise inadmissible.

In the present case, if the facts as alleged by the husband are correct, it is clear that it would have been possible, and indeed easy, for the petitioner himself to have identified as his own wife the woman living with Lazarus Thaddeus and then to have called other evidence to show that that woman was the mother of the child, who was baptised on the 13th

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January, 1932, and also evidence to show that the petitioner himself could not by reason of absence have been the father of that child. In any case the evidence actually given by the petitioner falls far short of establishing that he could not be the father of the child in question, even if that evidence had been legally admissible.

We think that the case should go back to the District Judge with a direction to give the petitioner a further opportunity of establishing the averments in his petition by evidence which is legally admissible.

GHOSE J. I agree. The learned judge has come to the conclusion on the uncorroborated testimony of the husband that he had no access to his wife at any time when the child, which was born on the 3rd January, 1932, would have been begotten. It was held in *Russell* v. *Russell* (1) and also in many previous decisions that the evidence of the husband alone is not sufficient to prove non-access. It must be proved by the evidence other than that of the husband.

I agree that the case should go back and the petitioner be given an opportunity of adducing further evidence.

HENDERSON J. I agree. In his petition, the petitioner appears to have made a case that his wife was living in open adultery with the co-respondent at Kharagpur. As he himself was living elsewhere, it is quite obvious that he was not in a position to give any real evidence on the point, and he should have examined witnesses, who are in a position to do so.

It is not at all clear from the judgment of the learned judge on what he based his decree. If he

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intended to rely on the mere proof of the birth of the child, he has entirely ignored the provisions of section 112 of the Indian Evidence Act. Apart from any consideration of the admissibility of evidence of this kind, the deposition of the petitioner as recorded, even if accepted in full, would not amount to proof of non-access.

I, therefore, agree that the case should be remanded.

Case remanded.

G.S.